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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. _____

SPALDING LAUNDRY & DRY CLEANING COMPANY, - - - - - - - *Appellant,*

v.

DEPARTMENT OF REVENUE, COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

JURISDICTIONAL STATEMENT.

This is an appeal by the Spalding Laundry & Dry Cleaning Company ("Spalding") from the judgment of the Court of Appeals of Kentucky entered on February 21, 1969, reversing the judgment of the Jefferson Circuit Court and affirming an order of the Kentucky Board of Tax Appeals assessing a sales and use tax on the purchase of certain manufacturing equipment made by Spalding.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

OPINIONS BELOW.

The opinion of the Court of Appeals of Kentucky is reported at 436 S. W. 2d 522, and is set forth herein in Appendix A. The opinion of the lower court, the Jefferson Circuit Court, Chancery Branch, is not contained in the official reports but is set forth in Appendix A and the order of the Kentucky Board of Tax Appeals (No. K-65-R-5) is likewise set forth in Appendix A.

JURISDICTION.

This matter commenced with a ruling by the Kentucky Department of Revenue that certain items of machinery (such as boiler parts) purchased in an expansion of Appellant's business did not fall within the exemption provisions of the Kentucky Sales and Use Tax Law, Kentucky Revised Statute 139.480(8) as defined by Kentucky Revised Statute 139.170. The Kentucky Board of Tax Appeals upheld the Department and this ruling was appealed to the Jefferson Circuit Court.

The Circuit Court reversed the Board of Tax Appeals and held that the denial of the exemption to this Appellant was a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. A copy of this decision is found in Appendix A.

The Department of Revenue appealed this decision to the Kentucky Court of Appeals which reversed the lower court and reinstated the order of the Board of Tax Appeals. This opinion was handed down on

October 25, 1968 and Appellant's Petition for Rehearing was overruled on February 21, 1969 and the mandate issued that same date. A copy of this Order is set forth in Appendix B.

Appellant's Notice of Appeal to this court was filed in the Court of Appeals of Kentucky on March 26, 1969, within the statutorily prescribed period.

The question involved is the constitutionality, under the Fourteenth Amendment of the United States Constitution, of KRS 139.170 which limits to manufacturing industries the broad exemption set forth in KRS 139.480(8).

The Kentucky statute was found to be in violation of the Fourteenth Amendment by the lower court, but the Kentucky Court of Appeals reversed and expressly rejected Appellant's direct challenge of the statute's constitutionality. The Supreme Court clearly has jurisdiction to review the decision of the Court of Appeals by direct appeal under the provisions of 28 U.S.C. § 1257(2). *Warren Trading Post Company* v. *Arizona Tax Commission, et al.*, 380 U. S. 685 (1965); *Standard Oil Company of California* v. *Johnson, Treasurer of California*, 316 U. S. 481 (1942).

The Kentucky Statutes that are directly involved are as follows:

Acts of the General Assembly of the Commonwealth of Kentucky, Regular Session 1960, Chapter 5, Article I, Section 47(h), page 24.

> "KRS 139.480. Any other provisions of this chapter to the contrary notwithstanding, the terms 'sale at retail,' 'retail sale,' 'use,' 'storage,' and

'consumption,' as used in this chapter do not include the sale, use, storage or other consumption of: . . .

(8) Machinery for new and expanded industry."

Acts of the General Assembly of the Commonwealth of Kentucky, Regular Session 1960, Chapter 5, Article I, Section 17, page 16.

"KRS 139.170. 'Machinery for new and expanded industry' shall mean that machinery used directly in the manufacturing process, which is incorporated for the first time into plant facilities established in this state, and which does not replace machinery in such plants."

QUESTION PRESENTED.

Whether or not the taxing of a sale of Machinery to a "service" industry and exempting from the tax an identical sale to a "manufacturing" industry is arbitrary and unreasonable and in violation of the equal protection clause of the Fourteenth Amendment when the basis of the classification as between manufacturing and service industries has no substantial relationship to the object sought to be achieved by the legislation.

STATEMENT OF THE CASE.

A. Facts.

The Appellant, Spalding, operates a laundry and dry cleaning business in Louisville, Kentucky and in recent years has purchased many pieces of new machinery to expand existing facilities, for the addition of new special services, and for equipping additional outlets at new locations.

The Appellee, Department of Revenue, is undertaking to collect a sales tax on the purchase of this equipment although there is no question that it was purchased for new and expanded facilities. It is agreed that under Kentucky law the Appellant, Spalding, is engaged in a "service" industry and not in a "manufacturing" industry, *Muir* v. *Samuels*, 100 Ky. 605, 62 S. W. 481.

The Kentucky sales tax statute places the tax on the vendor, but requires him to collect the tax from the vendee and remit it to the state. *Marcum v. Louisville Public Housing Commission*, Ky., 374 S. W. 2d 865. The act grants a broad exemption on sales made of "machinery for new and expanded industry," Kentucky Revised Statutes 139.480(8), but in a separate section the act undertakes to classify industries and limit the exemption to sales to manufacturers, Kentucky Revised Statute 139.170. If this classification is upheld then Spalding is not entitled to the exemption on its purchases.

The legislative purpose of the broad exemption for new and expanded industry is to encourage both the

location of new industries in Kentucky and the expansion of existing ones. This is agreed to by counsel for the Appellee and was so found by the lower court in Kentucky. The lower court's opinion states as follows (Appendix A, pp. 24, 25):

> "The purpose of the legislation was to stimulate industry that is presently operating in the Commonwealth of Kentucky and to encourage new industry to come into Kentucky. The economic growth of Kentucky and the prosperity of its citizens is no less sought, stimulated or desired from service industries than from manufacturing industries. They are both sought and needed. Service industries are more numerous and usually have less financial investment. The desirability in the Commonwealth of a service industry is no less than a manufacturing industry. As a matter of fact many of the smaller communities in this Commonwealth can, and as a matter of fact, are benefited from service industries where they have no possibility of securing aid from a manufacturing industry. The economic help available for the Commonwealth of Kentucky as a whole, with special emphasis on the smaller communities, is stimulated by service industries. 'Machinery for new and expanded industry' is just as necessary and important for service industries as to manufacturing industries.
>
> "This Court, as well as counsel for appellant, [Spalding] agrees with the statement of counsel for appellee [Department of Revenue] which appears on page 3 of his brief filed with the Kentucky Board of Tax Appeals that:

> * * * The purpose of the exemption for new and expanded industry was clearly intended to encourage the location of new industry in this state and the expansion of existing industry. * * *.
>
> "There is no contention made that the establishment of a new service industry, or the expansion of an existing service industry is not as much for the benefit of the public at large, or is less related to the purpose for which the tax is imposed, than is the establishment of a manufacturing industry or the expansion of a manufacturing industry. There is no difference in the end to be accomplished."

Since this opinion was rendered, counsel for the Department of Revenue has apparently changed his position and the Court of Appeals of Kentucky has gone along with him (Appendix A, p. 15), but the *fact* remains that the classification is an arbitrary one that is expedient for purposes of raising revenue but denies to this Appellant and others similarly situated the equal protection of the laws.

B. Federal Question.

The Federal question in this case was presented in the initial stages before the Board of Tax Appeals (Appendix A, pp. 27-28). Subsequently the question was presented to the Circuit Court which held that the attempted classification violated the provisions of the Fourteenth Amendment (Appendix A, p. 20, *et seq.*) and the question was placed before the Kentucky Court of Appeals which ruled adversely to this Appellant (Appendix A, p. 15, *et seq.*).

THE QUESTION IS SUBSTANTIAL.

The amount of tax dollars involved in this particular bit of litigation is not substantial, the principles involved are. Much may be made of the fact that there is a technological difference between a manufacturing industry and a service industry, but there is no difference which relates to the purpose of this particular legislation. If this classification is permitted to stand, then a serious inroad has been made in the basic guidelines of permissible discrimination through classification.

In *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, Mr. Justice Sutherland made this statement of the law (at p. 37 of the opinion):

> "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara* v. *Southern Pac. R. Co.*, 18 Fed. 385, 388-399; *The Railroad Tax Cases*, 13 Fed.

722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Airway Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240. That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare *Martin* v. *District of Columbia,* 205 U. S. 135, 139; *Bell's Gap R.R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237." (Emphasis ours.)

In *Atchison, Topeka & Santa Fe R.R. Co.* v. *Matthews,* 175 U. S. 92, the essence of equal protection is again discussed by the Court in the following language, commencing at page 104 of the opinion:

". . . the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact

> that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. *Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed.*" (Emphasis ours.)

The classifications in the present case do not meet the well known criteria set forth in the above cited authorities, and if this case is not heard on its merits and reversed the door is well opened to state legislative discrimination based solely upon the narrow whims of the moment.

One example of the absurdity of the results of this classification is the purchase by Spalding of parts of a new boiler which it is agreed were for the expansion of the Appellant's business. The sales tax in question is on the vendor of these parts and if the vendor sells the boiler to a shirt manufacturer for the expansion of his business the tax does not apply, whereas if the identical boiler is sold to expand Spalding's business of laundering the shirts the tax does apply. We submit that this is arbitrary and unreasonable.

The decision by the Court of Appeals of Kentucky in this case should be reversed and we ask that probable jurisdiction be noted by the Supreme Court to avoid

this serious departure from the basic doctrines of permissible classifications for taxation under the equal protection clause of the Fourteenth Amendment to the Constitution.

Respectfully submitted,

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APPENDIX "A"

COURT OF APPEALS OF KENTUCKY

RENDERED: OCTOBER 15, 1968

DEPARTMENT OF REVENUE, COMMONWEALTH OF KENTUCKY, - - - - - - - - *Appellant,*

v.

SPALDING LAUNDRY AND DRY CLEANING COMPANY, - - - - - - - - - - *Appellee.*

Appeal from Jefferson Circuit Court, Chancery Branch, Second Division, Hon. Marvin J. Sternberg, Judge.

OPINION OF THE COURT BY COMMISSIONER CLAY—REVERSING.

This is an appeal from a judgment setting aside an order of the Kentucky Board of Tax Appeals which confirmed a sales tax assessment against appellee. The trial court found that KRS 139.170, which defines exempted "machinery", in failing to encompass appellee's property was arbitrary and unreasonable, and consequently violative of sections 3 and 171 of the Kentucky Constitution and the Fourteenth Amendment to the United States Constitution. The statute in question was declared void.

Appellee is engaged in the laundry and dry cleaning business. When expanding its plant in 1965 it purchased some new machinery. It claimed this machinery exempt from the sales tax under KRS 139.480(8), which exempts "Machinery for new and expanded industry". However, KRS 139.170 defines such machinery as:

> "* * * that machinery used directly in the manufacturing process, which is incorporated for the first time into plant facilities established in this state, and which does not replace machinery in such plants."

Appellee concedes that it is not in a manufacturing industry and therefore its new machinery is not exempt under the definition last above quoted. See Muir v. Samuels, 110 Ky. 605, 62 SW 481. Its contention, upheld by the circuit court, is that the statute, in restricting exempt machinery to that used in *manufacturing*, is arbitrarily and unreasonably discriminatory.[1]

There is no controversy about the applicable legal principles. In the field of taxation (as in other areas) the legislature may make classifications, and the constitutional limitations prohibit only such classifications as are arbitrary and unreasonable in having no fair and substantial relation to the permissible governmental purpose of the legislation. See Burge v. Marcus, Ky., 394 SW 2d 908; Louisville Gas Co. v. Coleman, 277 U.S. 32. Our question is whether the exemption of machinery used in manufacturing is arbitrary and unreasonable because it does not equally exempt similar machinery used in a service industry or plant.

It is common knowledge that in recent years states have strenuously competed for new and expanded industrial development to improve the overall economy of the sovereignty. The promotion of such development, by providing tax benefits, is now a fixed policy of this Commonwealth. In 1955 the people of this state, by amendment to section 170 of the Kentucky Constitution, empowered the General Assembly to authorize cities or towns to exempt "manufac-

[1]Appellee can only succeed if the restrictive definition statute, KRS 139.70, is knocked out and KRS 139.480(8) (which it modifies) does not fall with it, thereby creating an exempt category of all "machinery for new and expanded industry."

turing establishments" from municipal taxation (for a period not exceeding five years) "as an inducement to their location". By KRS 91.260 and 92.300 the legislature has authorized cities to exempt "manufacturing establishments" from city taxation. KRS 132.200(4) exempts from county, city, school, or other taxing district taxes, machinery "of individuals or corporations actually engaged in manufacturing, * * *".

It is evident therefore that in the minds of the people and the legislature a legitimate public purpose is served by encouraging the location and expansion of manufacturing industries in this state. That such tax exemption statutes are valid is not questioned. See 51 Am. Jur., Taxation, section 591 (page 576); Todd County v. Bond Bros., 300 Ky. 224, 188 SW 2d 325. As pointed out in that case, the objective was to increase the resources of the state and its taxable property "through the establishment of new industries".

It is the contention of appellee that since the purpose of such statutes is the promotion of the general welfare by improving the economy of the state, it is arbitrary and unreasonable to discriminate between different kinds of industrial machinery. However, it is peculiarly a matter of legislative selection, in balancing the public benefits against the tax loss, to determine what type of industry will best promote the general welfare. Considering the public purpose involved, surely the legislature could distinguish between large plants and small plants.

It is entirely reasonable for such a body to conclude that the development of manufacturing plants would have a greater beneficial impact on the state economy than the development of other industries. The reasonable basis for putting a manufacturing plant in a class by itself, for the purpose of inducing its location in Kentucky by bestowing tax benefits, is pointed out in City of Lexington v. Lexing-

ton Leader Co., 193 Ky. 107, 235 SW 31. It was there said that the location of a newspaper was a matter generally influenced by local circumstances unrelated to tax benefits. We may also observe that a newspaper might well offer less in the way of employment and the utilization of natural resources than a manufacturing plant.

Of course it can be said that any industry improves the economy of the state, and carried to its logical conclusion appellee's argument would invalidate any discriminations based on the *use* of the property involved. Yet it will be noted that the exempt status of the eight different classes of property provided for in KRS 139.480 is tied to the use of such property. It is common knowledge that the tax benefit provisions of our Constitution and statutes here under consideration were principally designed to induce the location in Kentucky of outside interests, and particularly the most successful one available. It is not unreasonable to conclude that the manufacturing industry offered the best field for promotion. Service and other industries would normally offer a lesser potential from the standpoint of capitalization, employment, stability and expansion. Manufacturing machinery produces goods which ordinarily would be subject to the sales tax, whereas service industries do not produce a taxable product. At least these are valid considerations the legislature could take into account.

This is a policy matter which, as we have said, is peculiarly one for legislative determination. The wisdom of the policy is a matter not before us. There are sound reasons which justify placing in the tax exempt category only that machinery for new and expanded industry which is used in the manufacturing process. We do not find KRS 139.170 arbitrary and unreasonable.

It is unnecessary to pass upon other questions raised on this appeal.

The judgment is reversed, with directions to enter a judgment for the Commonwealth affirming the order of the Kentucky Board of Tax Appeals.

All concur except Osborne, J., not sitting.

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JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, SECOND DIVISION

No. C95763

SPALDING LAUNDRY & DRY CLEANING COMPANY, - *Appellant,*

v.

DEPARTMENT OF REVENUE OF COMMONWEALTH OF KENTUCKY, - - - - - - *Appellee.*

OPINION.

This is an appeal from a final order of the Kentucky Board of Tax Appeals (KRS 131.370[1]).

Appellant, hereafter referred to as Spalding, operates a laundry and dry-cleaning business in Louisville, Jefferson County, Kentucky. During the years 1960 through 1964, it purchased various pieces of machinery and equipment to facilitate the handling of the increase in its business. The new machinery was necessary due to a great increase in volume of business, for the addition of new special services and for equipping additional outlets at new locations.

The only question before the Court is whether KRS 139.170 makes an unreasonable classification between "machinery used in manufacturing process" and "machinery used in laundry and dry-cleaning processes."

It is provided by KRS 139.480(8):

> "Any other provision of this chapter to the contrary notwithstanding, the terms 'sale at retail,' 'retail sale,' 'use,' 'storage,' and 'consumption,' as used in this

chapter do not include the sale, use, storage, or other consumption of:

"(8) Machinery for new and expanded industry."

"Machinery for new and expanded industry" is defined by KRS 139.170 as:

"'Machinery for new and expanded industry' shall mean that machinery used directly in the manufacturing process, which is incorporated for the first time into plant facilities established in this state, and which does not replace machinery in such plants."

Appellant is engaged in a "service industry" and not in a "manufacturing industry" (Muir v. Samuels, 110 Ky. 605, 62 S. W. 481; City of Lexington v. Lexington Leader Company, 193 Ky. 107, 235 S. W. 21). Appellant charges that, and the salient question before this Court is whether, the classification which creates a distinction between a "service industry" and a "manufacturing industry" is arbitrary and unreasonable, thereby in violation of Sections 3 and 171 of the Kentucky Constitution and the Fourteenth Amendment to the Constitution of the United States.

Sections 3 and 171 of the Kentucky Constitution authorize the Legislature to place property in different classifications and to exempt certain properties from taxation so long as the classification is not arbitrary or unreasonable.

The Fourteenth Amendment to the Constitution of the United States guarantees that all persons within a legal classification are treated alike.

Appellant is not challenging a classification of *taxpayers* or property, but its challenge is directed at an attempted classification based on the *use* to which an article is put after its sale. In other words, the Court must determine whether the classification of machinery

used in the manufacturing process as against machinery to be used in non-manufacturing process are classifications reasonably related to a valid objective.

In the case of Marcum v. City of Louisville Municipal Housing Commission, Ky., 374 S. W. 2d 865, the Court of Appeals held that the tax imposed by Chapter 139 KRS is on the retailer and not on the consumer. In the course of the opinion the Court stated:

> "* * * The Kentucky statute merely permits the retailer to collect from the consumer. The fact that the burden may be passed on certainly does not convert the tax from one on the retailer to one on the consumer."

The classification, be it a classification based upon retail sales or a classification based on the use to which the property is put (the consumer), must rest on some difference having a fair and substantial relation to the object sought to be accomplished. If the classification does not have a fair and substantial relation to the object sought to be accomplished, then and in that event all persons in the classification are not treated alike and there is an arbitrary imposition of the tax.

This is borne out by the case of Hartman v. City of Louisville, 282 Ky. 487, 138 S. W. 2d 948, wherein the Court of Appeals stated:

> "That the legislature may classify objects of taxation is no longer open to doubt. The only restriction being that classification must rest on a reasonable basis."

With respect to classification based on manufacturing, we find in 51 Am. Jur., Taxation, § 591, that:

> "There is no doubt of the power of the legislature to exempt manufacturers and manufacturing enter-

prises from taxation as a matter of public or governmental policy when its powers in this respect are not limited by the state constitution and the primary purpose is not to aid and benefit private persons for private ends, but to benefit the public at large, by increasing in the end the resources of the state in its taxable property through the establishment of new industries."

In the case of Reeves v. Louisville Gas & Electric Company, 290 Ky. 25, 160 S. W. 2d 391, the Court of Appeals recognized that:

"* * * The underlying purpose of the constitutional amendment to Section 171 and the statute is, in part, to encourage manufacturing for its consequent public benefit. * * *"

Argument was made that the exemption of machinery from ad valorem taxes was invalid. Although there actually was no challenge based on classification of property, yet the classification was recognized and upheld.

In the case of Todd County v. Bond Bros., 300 Ky. 224, 188 S. W. 2d 325, the Court of Appeals held that certain products did not come within the definition of "manufactured products" as provided by Kentucky Statutes. No question was raised as to the classification between "manufactured products" and "products in the course of manufacture". In the course of the opinion, however, the Court stated:

"* * * No doubt exists as to the power of the Legislature to exempt manufacturers, manufacturing enterprises as a matter of policy primarily not to aid in the benefit of private persons for private ends, but for the benefit of the public at large by increasing resources of the state and its taxable property through the establishment of new industries. * * *"

In the case of City of Covington v. Dalheim, 126 Ky. 26, 102 S. W. 829, the Court of Appeals considered an ordinance purporting to levy a tax on the business of a grocer. The Court of Appeals, however, determined that in actuality the tax was not on the grocer but was on the vehicles used to deliver the groceries and was beyond the authority of the City to tax. In the course of the opinion, the Court of Appeals, speaking by Judge O'Rear, said:

> "It is competent for the city to select any of the enumerated classes as subjects for license taxes. But it is not competent for it to tax some members of a class set apart by the Legislature and not tax others of the same class. * * *"

In the case at bar, this Court determines that it was the intention to provide an exemption which would encourage new and expanded industry.

The case of United Shoe Machinery Corp. v. McCracken County, Ky., 265 S. W. 2d 929, cited by attorney for the respondent, merely affirms the proposition that machinery used in the course of manufacturing is a proper subject for special consideration as was held in the cases of Reeves v. Louisville Gas & Electric Company and Todd County v. Bond Bros., supra.

The purpose of the legislation was to stimulate industry that is presently operating in the Commonwealth of Kentucky and to encourage new industry to come into Kentucky. The economic growth of Kentucky and the prosperity of its citizens is no less sought, stimulated or desired from service industries than from manufacturing industries. They are both sought and needed. Service industries are more numerous and usually have less financial investment. The desirability in the Commonwealth of a service industry is no less than a manufacturing industry. As a matter of fact many of the smaller communities in this Commonwealth can, and as a matter

of fact, are benefited from service industries where they have no possibility of securing aid from a manufacturing industry. The economic help available for the Commonwealth of Kentucky as a whole, with special emphasis on the smaller communities, is stimulated by service industries. "Machinery for new and expanded industry" is just as necessary and important for service industries as to manufacturing industries.

This Court, as well as counsel for appellant, agrees with the statement of counsel for appellee which appears on page 3 of his brief filed with the Kentucky Board of Tax Appeals that:

> "* * * The purpose of the exemption for new and expanded industry was clearly intended to encourage the location of new industry in this state and the expansion of existing industry. * * *"

There is no contention made that the establishment of a new service industry or the expansion of an existing service industry is not as much for the benefit of the public at large, or is less related to the purpose for which the tax is imposed, than is the establishment of a manufacturing industry or the expansion of a manufacturing industry. There is no difference in the end to be accomplished.

The act under consideration was adopted by the regular 1960 session of our General Assembly. The challenged definition section (KRS 139.170) appears in the original act as Article I, Section 17. The exclusive section, which now appears as KRS 139.480(8), appears in the act as Article I, Section 47(h). The elimination of KRS 139.170 will not have the effect of cancelling out or eliminating KRS 139.480(8), but will give equal treatment to all taxpayers in the same classification.

The Court of Appeals of Kentucky, in the case of Burns v. Shepherd, 264 S. W. 2d 685, and in the case of City of Pineville v. Farrow, 273 S. W. 2d 56, held that if the in-

valid part of a statute is severable from the rest, the valid part may be sustained; but where provisions are so connected that it cannot be presumed that the Legislature would have passed one without the other, the whole statute falls. The definition provision is severable from the exclusion provision, and there is no doubt in this Court's mind that the Legislature would have adopted the exclusion irrespective of the definition. The exclusion (KRS 139.480[84]) affords all the relief offered by the defintion section (KRS 139.170) but will extend the exemptions to non-manufacturing industries.

It is the opinion of the Court, therefore, that the attempt by the Legislature to eliminate from the exclusion, by definition, service industry creates an unreasonable classification unrelated to the object sought to be accomplished by the act. The definition, therefore, would be in violation of Sections 3 and 171 of the Kentucky Constitution and the Fourteenth Amendment to the United States Constitution in that not only does the definition create an arbitrary and unreasonable classification, but also it denies to all people within the legal classification similiar treatment.

Counsel for the appellant will prepare an order in keeping with this Opinion and tender it to this Court for entry on Thursday, November 2, 1967, at 10:00 a.m., to which time this cause it now continued.

Marvin J. Sternberg,
October 24, 1967 *Judge*

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APPENDIX "A"

KENTUCKY BOARD OF TAX APPEALS

No. K-65-R-5

SPALDING LAUNDRY AND DRY CLEANING COMPANY, *Appellant*

v.

DEPARTMENT OF REVENUE, COMMONWEALTH OF KENTUCKY, *Appellee*

ORDER No. K-222

The issue presented on this appeal is whether laundry and dry cleaning equipment are "machinery for new and expanded industry" within the meaning of KRS 139.480(8) and is thus exempt from sales and use taxation.

Appellant, Spalding Laundry and Dry Cleaning Company, operates a laundry and dry cleaning business. It purchased certain items of equipment for usage in its business. The Department of Revenue made an assessment of sale and use tax on the purchase of this equipment and confirmed the assessment by final action in letter form dated March 3, 1965. This appeal timely followed.

Appellant contends on this appeal that:

1. The items of equipment qualify as "machinery for new and expanded industry" and are therefore exempt from sales and use taxation under KRS 139.480(8) and KRS 139.470.

2. If the equipment does not qualify as exempt under the foregoing statutes, then KRS 139.470 is unconstitutional as making an unreasonable classification between machinery

used in the manufacturing process and in the non-manufacturing process.

The statutes in issue here are KRS 139.480 and KRS 139.470. KRS 139.480 exempts from sales and use taxation:

"(8) Machinery for new and expanded industry."

As definitive of this exemption, KRS 139.470 states:

> "'Machinery for new and expanded industry' shall mean that machinery used directly in the manufacturing process, which is incorporated for the first time into plant facilities established in this state, and which does not replace machinery in such plants."

We do not think that a laundry and dry cleaning business comprises a "manufacturing process" as that term is used in KRS 139.470. The usual and customary meaning of manufacturing does not come to mind when a shirt is laundered or a suit is cleaned. A manufacturer sells a product but a laundry and dry cleaning business sells a service. This particular question was fully considered in American Tobacco Co. v. City of Bowling Green, et al., 265 S. W. 570. It was therein said:

> "(1, 2) It is somewhat difficult to formulate a satisfactory definition as to what constitutes manufacturing, from the decisions of the courts, or to say when it begins. In Words and Phrases, vol. 5, p. 4348, it is said:
>
> > 'The primary meaning of the word "manufacturing" is something made by hand as distinguished from a natural growth; but, as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily, the article so manufactured takes a different form, or at least subserves a different purpose, from the original materials, and

usually it is given a different name. Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product. Thus logs are first manufactured into boards, planks, joists, scantlings, etc., and then by entirely different processes are finished into boxes, furniture, doors, windows, sashes, trimmings, and a thousand and one articles manufactured wholly or in part of wood. The steel spring of a watch is made ultimately from iron ore, but by a large number of processes or transformations, each successive step in which is a distinct process of manufacture, and in which the article so manufactured receives a different name.' Citing Tidewater Oil Co. v. United States, 171 U. S. 210, 18 Sup. Ct. 837, 43 L. Ed. 139, and State v. American Sugar Refining Co., 51 La. Ann. 562, 25 South. 447.

"The generic meaning of the term 'manufacture' is 'made by hand'; but in the development of business manufacturing has come largely to mean a process of making things by machinery. But there is no hard and fast rule which can be applied generally; each case must be decided under its own facts, and with a view of carrying out the intention of the Legislature by giving a reasonable interpretation of the statute involved. Thus in Re Troy Steam Laundering Co. (D.C.), 132 Fed. 266, where the laundering company was engaged chiefly in taking collars and cuffs from the companies that manufactured them, and putting the final polish on the collars and cuffs before they were sold as a part of the completed garment, it was held that the laundering company was engaged in manufacturing. But where a steam laundering company receives the soiled collars and cuffs from a customer for the purpose of washing

and ironing them, can it be said that it is then engaged in manufacturing? Clearly not, although the two processes were substantially identical. Muir v. Samuels, 110 Ky. 605, 62 S. W. 481, 23 Ky. Law Rep. 14."

KRS 139.170, in creating an exemption for machinery used in the manufacturing process, has not established an unreasonable classification. A similar issue involving another tax exemption statute was involved in the case of Todd County v. Bond Brothers, 188 S. W. 2d 325, and it was therein said:

"No doubt exists as to the power of the legislature to exempt manufacturers, manufacturing enterprises as a matter of policy primarily not to aid in the benefit of private persons for private ends, buf for the benefit of the public at large by increasing the resources of the state and its taxable property through the establishment of new ndustries."

It Is Therefore Ordered by the Kentucky Board of Tax Appeals that the final action dated March 3, 1965, by the Department of Revenue against Spalding Laundry and Dry Cleaning Company be and the same is hereby affirmed.

This 29 day of October, 1965.

Kentucky Board of Tax Appeals

(s) Jack T. Page,
Chairman

Attested:

By: (s) Ellis A. Merrifield,
Clerk

APPENDIX "B"

MANDATE.

THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals
Fall Term—October 25, 1968

DEPARTMENT OF REVENUE, COMMONWEALTH OF KENTUCKY

v.

SPALDING LAUNDRY & DRY CLEANING CO.

CR 95763

Appeal from a judgment of the Chancery Branch, 2nd Division, Jefferson Circuit Court.

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that the judgment is reversed, with directions to enter a judgment for the Commonwealth affirming the order of the Kentucky Board of Tax Appeals; which is ordered to be certified to said Court.

It is further considered that the appellant recover of the appellee its cost herein expended.

Judge Osborne not sitting.

A copy—attest:

Dick Vermillion, C. C. A.
By (s) John C. Scott, D. C.

Issued February 21, 1969.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1969

No. [redacted]
133

SPALDING LAUNDRY & DRY CLEANING COMPANY - - - - - - - - *Appellant*

versus

DEPARTMENT OF REVENUE, COMMONWEALTH OF KENTUCKY - - *Appellee*

On Appeal from the Court of Appeals of Kentucky

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 1402

MOTION TO DISMISS OR AFFIRM

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A

The Statute

Kentucky Revised Statutes (Acts of the General Assembly of the Commonwealth of Kentucky, Regular Session 1960), Chapter 6, Article 1, Section 17 (b), page [illegible], exempts from the Kentucky sales and use tax "machinery for new and expanded industry."

The statute in question, KRS 139.470, defines "machinery for new and expanded industry" as "that machinery predominately in the *manufacturing* process which is incorporated for the first time into [illegible] facilities established in this state, and which [illegible] and technical machinery or such plants." (Emphasis added.)

The Proceedings Below

[illegible] Kentucky. During the year 1963 it purchased some new machinery in order to improve [illegible] claimed that this machinery was exempt from the Kentucky sales tax under KRS [illegible] which exempts "machinery for new and expanded industry." Although conceding that it was [illegible] manufacturing industries and therefore that the purchases of new machinery were not exempt under the definition of "machinery for new and expanded industry" set forth in KRS 139.470, the contention is that KRS 139.470, in restricting such machinery to that used in manufacturing, is arbitrary, unreasonable and violative of the Equal Protection Clause of the Fourteenth Amendment.

Conceding that KRS 139.470 was unconstitutional as applied to the taxpayer, the Kentucky Board of Tax Appeals refused to hold the validity of the classification

Thereafter, an appeal was made to the Jefferson Circuit Court wherein the order of the Board of Tax Appeals was reversed. Upon appeal to the Court of Appeals of Kentucky the classification was upheld as not violative of any constitutional provision.

II

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

The power of a state to classify businesses for purposes of taxation is well settled. It has the widest latitude in selecting subjects of taxation and in granting tax exemptions. In *Cooley Dickson Co. v. Virginia*, 313 U.S. 117 (1941), wherein peddlers were classified separately from other vendors, the Court said (313 U.S. at p. 124):

> "As we have repeatedly held, the equal protection clause of the Fourteenth Amendment does not prevent a state from classifying businesses for taxation or imposing different rates of taxation. Some occupations may be taxed though others are not. Some may be taxed at one rate, others at another rate. The distinctions and discrimination . . . [are] enough that those in the same class are treated with equality."

In *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), a requirement that only employers of eight or more persons pay a percentage of their total monthly payrolls into the state Unemployment Compensation Fund was held not violative of the Equal Protection Clause. It was said (301 U.S. at p. 509):

> "This Court has repeatedly held that inequalities which result from a singling out of one particular

ticular class for taxation or exemption infringes no constitutional limitation. (Citations omitted.)

". . . A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it." (Citations omitted.)

It is evident that a service industry such as the one in the instant case is in a distinctly separate class from a manufacturing industry, not only as to function but also with respect to size, employment capacity, and financial requirements. The legislature of Kentucky passed the statute in question for the justified purpose of inducing new manufacturers to come into the state and to encourage the expansion of existing manufacturing facilities. It is neither unreasonable nor arbitrary that the legislature considered that "manufacturing" industries search for those areas in which they can benefit most under the tax laws. A "service" industry is significantly different from a "manufacturing" industry. As pointed out by the Court of Appeals of Kentucky in this case (436 S.W. 2d at p. 824):

". . . Service and other industries would normally offer a lesser potential from the standpoint of capitalization, employment, stability and extension. Manufacturing machinery produces goods which ordinarily would be subject to the sales tax, whereas service industries do not produce a taxable product. At least these are valid considerations the legislature could take into account."

Clearly a classification which separates "manufacturing" and "service" industries into different taxing

categories is founded upon a rational basis supported by public policy. As stated by the Court in *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959):

> "... It has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment."

It is also evident that this particular classification is reasonable. In *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912) the Court sustained a classification which involved a license fee on hand laundries but not on steam laundries. There the Court said (223 U.S. at p. 59):

> "The case was argued upon the discrimination between the instrumentalities employed in the same business and that between men and women. *A state does not deny the equal protection of the laws merely by adjusting its revenue laws and internal system in such a way as to favor certain industries of young or infant industries.* Like the United States, although with more restriction and in less degree, a state may carry out a policy, even a policy with which we might disagree. McLean v. Arkansas, 211 U.S. 539, 547, 53 L. ed. 315, 319, 29 Sup. Ct. Rep. 206; Armour Packing Co. v. Lacy, 200 U.S. 226, 235, 50 L. ed. 151, 156, 26 Sup. Ct. Rep. 252; Connolly v. Union Sewer Pipe Co. 184 U.S. 540, 562, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431. *It may make discriminations, if founded on distinctions that are natural grounds, not wholly unreasonable and purely arbitrary*, as was illustrated in Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 292, 293, 42 L. ed. 1037, 1041, 1042, 18 Sup. Ct. Rep.

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

SPALDING LAUNDRY & DRY CLEANING CO.
v. DEPARTMENT OF REVENUE,
COMMONWEALTH OF
KENTUCKY.

APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

No. 123. Decided October 13, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.